No. 76-1010

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALLEGHENY COUNTY INSTITUTION DISTRICT, d/b/a JOHN J. KANE HOSPITAL, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ALFRED G. ALBERT,
Acting Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

LOIS G. WILLIAMS,
Attorney,
Department of Labor,
Washington, D.C. 20210.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1010

ALLEGHENY COUNTY INSTITUTION DISTRICT, d/b/a JOHN J. KANE HOSPITAL, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 544 F. 2d 148. The opinion of the district court (Pet. App. 16a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1976. The petition for a writ of certiorari was filed on January 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether female beauticians and male barbers, both providing basic hair care for geriatric patients, perform work that is "equal" within the meaning of the Equal Pay Act.

2. Whether the Equal Pay Act may constitutionally be applied to States and their subdivisions.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The pertinent provisions of the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), are set out at Pet. 5-6.

2. The Fourteenth Amendment provides in relevant part:

> SECTION 1. * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT

The Secretary of Labor brought this action in the United States District Court for the Western District of Pennsylvania to enjoin petitioner from violating the Equal Pay Act by maintaining a wage differential between the male barbers and female beauticians on its staff.

The district court found that both barbers and beauticians provided "basic hair care" for geriatric patients (Pet. App. 19a-20a). Both spent the majority of their time cutting hair, which requires use of the same basic tools (*id.* at 20a-21a). They worked the same number of hours (*id.* at 19a, 20a). Both reported scalp diseases to the nurses, and both cleaned their own tools. All barbers and beauticians attended professional schools, where they received similar training and experience; all were licensed by the State of Pennsylvania. The beauticians, unlike the barbers, also gave permanents and hair sets, straightened and relaxed hair, and shaved

patients with electric razors; they occasionally shampooed hair and polished and filed nails (Pet. App. 21a-22a). The barbers, unlike the beauticians, occasionally taught hospital aides how to shave patients (*id.* at 21a.)

Notwithstanding these findings that barbers and beauticians perform substantially identical tasks, the district court dismissed the action. It stated that barbers and beauticians were "members of two distinct licensed professions, trained by different type schooling, and whose jobs require unequal skill, effort and responsibility" (Pet. App. 17a).

The court of appeals reversed. It held that the district court's findings of fact on "basic work hours, place of work, predominant activity, additional acitivites, patient responsibilities, tools, and effort" (Pet. App. 7a) demonstrated that barbers and beauticians perform equal work within the meaning of the Act. The court of appeals concluded that the educational backgrounds and licensing requirements for barbers and beauticians were "virtually identical" (*id.* at 9a) and that, in such circumstances, the "mere fact that the two professions are separately licensed" was not significant (*id.* at 11a).

The court also held that the Equal Pay Act constitutionally may be applied to States and their subdivisions. It concluded, relying on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, that the Equal Pay Act is supported by Congress' power under Section 5 of the Fourteenth Amendment to define and enforce the equal protection of the laws. Although the Equal Pay Act had been joined with the Fair Labor Standards Act, part of which this Court invalidated in *National League of Cities* v. *Usery*, 426 U.S. 833, the court of appeals held that the Equal Pay Act was severable and rested upon a firm constitutional footing.

ARGUMENT

The decision of the court of appeals is correct. There is no conflict among the circuits concerning the validity of the Equal Pay Act, and petitioner's remaining argument involves only the application of settled principles to the facts of this case. Accordingly, there is no need for review by this Court.

1. Petitioner contends that the court of appeals unjustifiably discarded the district court's findings of fact (Pet. 22). On the contrary, the court of appeals accepted all of the district court's findings of fact (Pet. App. 9a) and held that these findings demonstrated that the jobs of barber and beautician were substantially identical.

Petitioner argues that the jobs were not identical because state licensing procedures lead to separate licenses and because, under the licensing scheme, persons may not transfer from one job to another. But it is settled that jobs need not be interchangeable to be substantially equal; it is enough that they be closely related and require substantially equal skill, effort, and responsibility. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 203-204 n. 24. Here, as the court of appeals observed, the district court's findings establish that the beauticians employed skill, effort, and responsibility "at least equal to that of the barbers" (Pet. App. 7a); to the extent there was any difference, the beauticians, who received the lower pay, employed the greater skill (*id.* at 10a). The Equal Pay Act therefore forbids the pay differential found to exist here.[1]

---

[1]It makes no difference that Pennsylvania has separate licensing systems for barbers and beauticians. The decision whether jobs are equal is one of federal law, and differences of nomenclature under state procedures do not matter. 29 C.F.R. 800.121; *Hodgson* v. *Behrens Drug Co.*, 475 F. 2d 1041, 1049-1050 n. 12 (C.A. 5), certiorari denied, 414 U.S. 822; *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719, 724 (C.A. 5). Nor does it make a difference that, under Pennsylvania law, men may be beauticians and women may be barbers. The fact remains that petitioner employs only female beauticians and male barbers, and that it pays barbers $165 per month more than beauticians. See Pet. App. 10a-11a, 23a.

2. Petitioner contends (Pet. 24-25) that the Equal Pay Act may not constitutionally be applied to States and their subdivisions. The argument is incorrect, and it has been rejected by the vast majority of courts that have passed upon it.[2]

a. The Equal Pay Act is an exercise of the power of Congress, under Section 5 of the Fourteenth Amendment, to enact appropriate legislation to enforce the Equal Protection Clause of Section 1 of that Amendment. This Court has held in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, that the Fourteenth Amendment worked a fundamental alteration of the allocation of power within our federal system. *Fitzpatrick* therefore sustained, against an Eleventh Amendment challenge, the power of Congress to provide for back pay as a remedy for unequal treatment on account of sex. The Equal Pay Act achieves the same objective—equal treatment without regard to sex—and is constitutional under the same grant of power to Congress. As

---

[2]District courts in 25 cases have reached the same conclusion as the court of appeals in the present case. Two district courts have agreed with petitioners. A list of the cases reaching this issue is set out for the convenience of the Court as an appendix to this brief. No other court of appeals has yet decided the issue, but cases presenting it are pending in four circuits. *Christopher* v. *Iowa*, C.A. 8, No. 76-1632; *Marshall* v. *Charleston County School* District, C.A. 4, No. 76-2340; *Usery* v. *Owensboro-Daviess County Hospital*, C.A. 6, No. 77-3069; *Usery* v. *City of Sheboygan*, C.A. 7, Misc. No. 76-8122.

the Court stated in *Ex parte Virginia*, 100 U.S. 339, 347-348, "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete."

Petitioner argues that the Equal Pay Act must fall with the Fair Labor Standards Act, part of which this Court held unconstitutional in *National League of Cities* v. *Usery*, 426 U.S. 833. It is true that the Equal Pay Act was placed within the Fair Labor Standards Act, but that does not end the matter. The Equal Pay Act is a separately considered statute enacted in 1963. It was "enacted at a different time, and aimed at a separate problem—discrimination on account of sex in the payment of wages" (Pet. App. 13a). The Fair Labor Standards Act contains a broad severability clause (29 U.S.C. 219), and so there is no reason why the Equal Pay Act should be affected by *National League*, unless the rationale of *National League* applies here as well.

We already have discussed the most important difference between this case and *National League;* although the minimum wage and overtime provisions of the Fair Labor Standards Act were enacted under the authority of the Commerce Clause alone, the sex discrimination provisions at issue here draw support from Section 5 of the Fourteenth Amendment as well as from the Commerce Clause.

Petitioner responds that the Equal Pay Act must be assessed as if it drew its authority from the Commerce Clause alone, because Congress explicitly invoked its Commerce Clause power when enacting the statute. The court of appeals properly rejected the argument that Congress must cite the correct source of power when enacting a statute; the constitutionality of Acts of

Congress depends upon the substance of their provisions, and not whether the committee reports or the preamble contain particular invocations of authority. The procedures for the enactment of legislation specified by Article I of the Constitution do not require Congress to utilize either published legislative history or a preamble—let alone to state an accurate constitutional theory in such documents. Nothing in Article I, or elsewhere in the Constitution, authorizes a court to strike down otherwise valid legislation merely because Congress misconceived the source of its authority to enact it. "In exercising the power of judicial review * * * we are concerned with the *actual powers* of the national government" (Pet. App. 14a; emphasis added).

The proper question is "whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained." *Keller* v. *United States*, 213 U.S. 138, 147. Indeed, Title VII of the Civil Rights Act of 1964, which this Court upheld in *Fitzpatrick* as an exercise of authority under Section 5 of the Fourteenth Amendment, also purported to be only an exercise of authority under the Commerce Clause. At the time Title VII was enacted in 1964 it applied only to private persons, just as the Equal Pay Act applied only to private persons when it was enacted in 1963. There therefore would have been no basis for a congressional assertion of power under the Fourteenth Amendment, which applies only to state action. Similarly, when Title VII was made applicable to the States in 1972, and when the Equal Pay Act was made applicable to petitioners in 1966 (and to other governmental entities in 1974), there was no reason for Congress to rely heavily upon its powers under the Fourteenth Amendment. The Civil Rights Act of 1964 had been sustained as a valid Commerce Clause enactment (*Katzenbach* v. *McClung*, 379 U.S. 294), and the 1966 extension of the Fair Labor Standards Act to

governmental entities like petitioner also was sustained as a valid Commerce Clause enactment (*Maryland* v. *Wirtz*, 392 U.S. 183). The fact that *National League* now has held that reliance upon the Commerce Clause was misplaced does not mean, however, that the Equal Pay Act may not be upheld under the Fourteenth Amendment. Under our constitutional system, a court is not authorized to invalidate a statute, otherwise within the substantive powers of Congress, just to see whether Congress would re-enact the statute with a different citation of constitutional authority.

b. Moreover, the Equal Pay Act is a valid exercise of power under the Commerce Clause, without regard to its validity under the Fourteenth Amendment. *National League* did not hold that Congress lacks any power under the Commerce Clause to regulate the States; the Court specifically stated (426 U.S. at 852-855) that it was not disturbing the holdings of *Fry* v. *United States*, 421 U.S. 542, *Parden* v. *Terminal R. R.*, 377 U.S. 184, *California* v. *Taylor*, 353 U.S. 553, and *United States* v. *California*, 297 U.S. 175, all of which sustained legislation, enacted under the commerce power, regulating States in their role as employers.

The Court concluded in *National League* that the Commerce Clause does not establish sufficient authority for the federal government to interfere in certain attributes of sovereignty that the States and their subdivisions exercise in carrying out traditional functions of government. But even if the establishment of geriatric hospitals like petitioner can be portrayed as a traditional function of the States,[3] the Equal Pay Act does not interfere in any significant way with the manner in which States are permitted to carry out that function.

---

[3]But see *Parden*, *supra*.

The minimum wage and overtime provisions of the Fair Labor Standards Act set wage and hour standards that could have required the States to rearrange the way jobs were performed and to pay their employees higher wages than state statutes provided. The Equal Pay Act, by contrast, does not compel any State to pay one wage rather than another. States retain full control over the wages paid to their employees; they retain full control over the number of employees to hire for each job, and what hours they shall work. The Equal Pay Act provides only that, once the State in its sole discretion has set a wage rate for employees of one sex, it must pay the same rate to employees of the other sex doing substantially equal work. This does not impinge on state autonomy or threaten to undermine the performance by the States of any of their essential and customary functions.[4] Therefore, under the standards this Court applied in *National League*, the Equal Pay Act would be a permissible exercise of the commerce power even if it stood on that power alone.

---

[4]Indeed, States could not reasonably claim that they have an interest in paying different wages to men and women who do the same work, because such sex discrimination would violate the Equal Protection Clause of the Fourteenth Amendment. It is hard to see how a State could argue that violations of the Equal Protection Clause are an "essential attribute" of its sovereignty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

ALFRED G. ALBERT,
Acting Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

LOIS G. WILLIAMS,
Attorney,
Department of Labor.

MARCH 1977.

DOJ-1977-03

APPENDIX

CASES DECIDED AFTER *NATIONAL LEAGUE OF CITIES* v. *USERY*, 426 U.S. 833, PASSING UPON THE CONSTITUTIONALITY OF THE EQUAL PAY ACT AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT AS APPLIED TO STATES AND THEIR SUBDIVISIONS

Equal Pay Act of 1963, 29 U.S.C. 206(d)

a. Cases upholding the Act

Christensen v. *Iowa*, 417 F. Supp. 423 (N. D. Iowa).

Usery v. *Charleston County School District*, D. S.C., No. 76-248, decided August 24, 1976.

Usery v. *Sioux City Community School District*, N.D. Iowa, No. C-76-4024, decided August 20, 1976.

Usery v. *Fort Madison Community School District*, S.D. Iowa, No. C-75-62-1, decided September 1, 1976.

Usery v. *Bettendorf Community School District*, 423 F. Supp. 637 (S.D. Iowa).

Usery v. *Berkeley Unified School District*, N.D. Cal., No. C-75-1558 SAW, decided September 27, 1976.

Usery v. *Kent State University*, N.D. Ohio, No. C75-550, decided October 6, 1976.

Usery v. *Washoe County School District*, D. Nev., No. R-75-216 BRT, decided October 13, 1976.

Usery v. *University of Nevada, Reno*, D. Nev., No. R-75-62 BRT, decided October 13, 1976.

Usery v. *Dallas Independent School District*, 421 F. Supp. 111 (N.D. Tex.).

Usery v. *University of Texas at El Paso*, W.D. Tex., No. EP-75-CA-221, decided October 14, 1976.

Usery v. *Memphis State University*, W.D. Tenn., No. C-75-54, decided October 29, 1976.

Usery v. *Baltimore County School District*, D. Md., No. K-76-762, decided November 16, 1976.

Usery v. *City of Brockton*, D. Mass., No. 76-2265-M, decided November 9, 1976.

Usery v. *Morrissey*, D. Mass., No. CA 74-2311-G, decided November 15, 1976.

Usery v. *A&M Consolidated Independent School District*, S.D. Tex., No. 74-H-1532, decided November 30, 1976.

Usery v. *Tennessee Technological University*, M.D. Tenn., No. 75-7-NE-CV, decided December 14, 1976.

Usery v. *Austin Peay State University*, M.D. Tenn., No. 75-42-NA-CV, decided December 14, 1976.

Usery v. *Kenosha Unified School District Number One*, E.D. Wisc., No. 73-C-399, decided December 13, 1976.

Usery v. *City of Sheboygan*, E.D. Wisc., No. 76-C-209, decided December 13, 1976.

Brown v. *County of Santa Barbara*, C.D. Cal., Nos. 75-3492-HP and 75-3978-HP, decided January 14, 1977.

National League of Cities v. *Marshall*, D. D.C. (three-judge court), No. 74-1812, decided January 31, 1977.

Usery v. *Eastern Kentucky University*, E.D. Ky., No. C.A. 76-15, decided January 21, 1977.

Usery v. *Council Bluff Community School District*, S.D. Iowa, No. 76-26-W, decided January 27, 1977

Usery v. *Oregon*, D. Ore., No. 74-629, decided February 12, 1977.

b. Cases holding the Act invalid

Howard v. *Ward County*, 418 F. Supp. 494 (D. N.D) (Title VII case denying Equal Pay Act jurisdiction but applying Equal Pay Act standards to afford relief to employee of county).

Usery v. *Owensboro-Daviess County Hospital*, 423 F. Supp. 843 (W.D. Ky).

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

Cases upholding the Act

Usery v. *Board of Education of Salt Lake City*, 421 F. Supp. 718 (D. Utah).

Springer v. *City of Los Angeles*, C.D. Cal., No. CV 76-2449-FW, motion to dismiss denied November 24, 1976.

Aaron v. *Davis*, W.D. Ark., No. LR-76-C-16, motion to reconsider judgment for plaintiff denied December 9, 1976.